No. 82-1465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED,
and McGREGOR, SWIRE AIR SERVICES LIMITED,

Petitioners,

against

TRANS WORLD AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether a treaty provision should be enforced notwithstanding a subsequent Act of Congress which abandoned the premise upon which the treaty provision had been based?

2. What is the proper conversion factor, if any, for the gold franc provision in the Warsaw Convention in view of the Congressional decision to eliminate an official price for gold?

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Petitioners, Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (collectively "Franklin Mint"),[1] request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on September 28, 1982, which affirmed a final judgment of the United States District Court for the Southern District of New York. Specifically, Franklin Mint seeks review of that portion of the

[1]Petitioners' designation of corporate relationships pursuant to Rule 28.1 is stated at page A 36. References in the form "A " are to the pages of the Appendix to this petition.

circuit court's decision declaring presently enforceable (although not prospectively so) a treaty provision, the premise of which was abandoned by an Act of Congress subsequent to the treaty. This petition is a cross-petition to the one filed by Trans World Airlines, Inc. ("TWA")[2] in Docket No. 82-1186.

Opinions Below

The opinion of the court of appeals, reported at 690 F.2d 303 (2d Cir. 1982), is reprinted in the Appendix at A1. The opinion of the district court, reported at 525 F. Supp. 1288 (S.D.N.Y. 1981), is reprinted at A19.

Jurisdiction

The judgment of the court of appeals was issued on September 28, 1982, and entered the same day (A23). TWA subsequently made a timely motion for a rehearing; and this motion was denied by the court on December 1, 1982 (A25). This petition is being filed within ninety days of the circuit court's denial of a rehearing. The Supreme Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. 1254(1).

Treaty and Statutory Provisions Involved

The treaty provision involved is Article 22 of the Warsaw Convention, which is formally known as the Convention for the Unification of Certain Rules Relating To International Transportation By Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, *reprinted*

[2]All the parties to the proceeding in the court of appeals are stated in the caption of this petition.

in 49 U.S.C. §1502 note (1970). Article 22 is set out at page A27.

The statute involved is the Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), *amended by* Pub. L. No. 93-110, 87 Stat. 352 (1973), *repealed by* Pub. L. No. 94-564, 90 Stat. 2660 (1976). The pertinent sections of the statute are reprinted at A28.

Statement of the Case

In March 1979 Franklin Mint contracted with TWA for the carriage by air of 714 pounds of numismatic articles from the United States to England. The cargo was lost or stolen in transit, and Franklin Mint brought suit for $250,000 to recover the cargo's value. The district court's jurisdiction was founded on both 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1332 (diversity of citizenship).

Following the joinder of issue, TWA moved for partial summary judgment. In a Stipulation and Pre-Motion Order, the parties stipulated to the basic, undisputed facts. It was further agreed, and the district court so ordered, that TWA was liable under the Warsaw Convention for the loss of the cargo. It was also stipulated and ordered that TWA was entitled to limit its liability in accordance with Article 22 of the Convention. As a result, the sole issue presented on TWA's motion was the proper interpretation of the limit in Article 22.

Article 22 states the limitation in air cargo cases to be 250 gold francs per kilogram of cargo. Franklin Mint contended in the district court that this gold franc provision must be converted into dollars by using the only existing price of gold, the free market price. With the elimination by Congress of an official price of gold, the only price for gold in the United States is that set on the open market.

TWA, on the other hand, argued that Article 22 must be interpreted by using one of three other possible units of conversion: (a) Special Drawing Rights ("SDR's") of the International Monetary Fund, (b) the last official price of gold, or (c) the current French franc.

The district court determined that the limit of TWA's liability for its loss of Franklin Mint's property was $6,475.98. This figure was based on a conversion of the gold franc using the last official price of gold. As the cargo had a stipulated value in excess of this limit, and as there were no remaining issues of either fact or law, the district court ordered that judgment be entered for Franklin Mint in the amount of $6,475.98, plus interest and costs. Franklin Mint moved for reconsideration of the decision, and the motion was denied.

Franklin Mint appealed from the final judgment of the district court. Again, the sole issue before the court was the proper interpretation of Article 22 of the Warsaw Convention. The parties repeated their earlier contentions as to the correct method of converting gold francs into dollars.

In an opinion dated 28 September 1982, the Second Circuit held that all four of the proposed conversion factors were subject to strong criticism. The court agreed, however, with Franklin Mint that the elimination by Congress of an official gold price had destroyed the status quo. In the court's view, the "repeal of the Par Value Modification Act was an explicit abandonment of the previously established unit of conversion." 690 F.2d at 311; A17. Congress has failed to substitute a new unit of conversion, and the choice of the proper unit involves a political question. Consequently, substitution of a new unit is not for the courts, with the result that the limit is unenforceable. *Id.*

Although Congress eliminated the official gold price as of 1 April 1978, the Second Circuit's ruling on the liability limit

is prospective only. According to the court of appeals, the limit will be unenforceable "only to events creating liability occurring 60 days from the issuance of the mandate in this case." 690 F.2d at 311-12; A18. Because Franklin Mint had failed to predict how the Second Circuit would treat Congress's repeal of the Par Value Modification Act, the shipper was bound by the last official price of gold. The district court's judgment for $6,475.98 was affirmed.

TWA timely moved for a reconsideration of the decision, with the suggestion of a rehearing en banc. This motion was denied 1 December 1982. The mandate of the court of appeals was stayed upon the filing of TWA's petition in Docket No. 82-1186.

Reasons for Granting the Writ

Certiorari should be granted because this case raises the significant question of whether the courts of the United States should enforce a treaty provision when Congress has eliminated the premise on which the provision was based. While the court of appeals correctly declared the limitation provision of the Warsaw Convention to be unenforceable, the Second Circuit held this ruling to be prospective only. In view of the significant role of the Warsaw Convention in American aviation law, the Court should review this decision of the court of appeals.

POINT I

This case concerns an important question of federal law which should be settled by this Court.

The Warsaw Convention is a multilateral treaty adhered to by over 120 nations. *See* U.S. DEP'T OF STATE, PUB. NO. 9285, TREATIES IN FORCE 270 (1982). It has been called "by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the

most widely adopted of all treaties . . . ." A. Lowenfeld, *Aviation Law* §4.1, at 7-98 (2d ed. 1981). As a treaty of the United States, it is in this nation the "supreme Law of the land." U.S. Const., art. VI.

The Convention is applicable to all normal international air transportation between the United States and other member nations. *See* Warsaw Convention, Art. 1. In addition, the Convention gives American courts jurisdiction over disputes arising from flights between member countries involving a United States air carrier. Warsaw Convention, Art. 28.

The scope of the Warsaw Convention is a matter of federal law and federal treaty interpretation. *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977); *Ricotta* v. *Iberia Lineas Aereas de Espana*, 482 F. Supp. 497, 499 (E.D.N.Y. 1979), *aff'd*, 633 F.2d 206 (2d Cir. 1980); *Husserl* v. *Swiss Air Transport Company, Ltd.*, 388 F. Supp. 1238, 1249 (S.D.N.Y. 1975).

The Warsaw Convention applies to both passengers and cargo. For example, Articles 3 and 4 state the provisions applicable to passenger tickets and baggage checks, while Articles 5-16 pertain to the air waybill. Article 22 provides the carrier with a limitation of liability for claims from both passengers (125,000 gold francs) and cargo (250 gold francs per kilogram of cargo).

Because of the low limitations set in 1929 by the Convention, the issue of the limit is involved in almost all Warsaw Convention litigation. The Convention's limit for a passenger's death is $10,000 when calculated using the last official price of gold.[8] Civil Aeronautics Board Order No. 74-1-16, 39 Fed. Reg. 1526 (1974). In the present case TWA's limit as determined by the

[8]In a private agreement called the Montreal Agreement of 1966, most of the international carriers agreed to accept a limit of $75,000 per passenger. The reason for this waiver to prevent United States withdrawal from the Convention. See A. Lowenfeld, *Aviation Law* §5.3 at 7-128 to 7-144 (2d ed. 1981).

lower courts is about 2.5% of the cargo's claimed value. As a consequence of such low limits, in litigation the crucial issue is often whether the limit can be defeated. *See In re Aircrash Disaster at Warsaw, Poland,* 535 F. Supp. 833 (E.D.N.Y. 1982), *appeal docketed,* No. 82-7616 (2d Cir. Aug. 19, 1982) (passenger); *Bank of Nova Scotia* v. *Pan American World Airways, Inc.,* 16 Av. Cas. 17,378 (S.D.N.Y. 1981) (not officially reported) (cargo).

Prior to 1978 the Convention's liability limits, which are expressed in terms of gold francs, were converted into dollars in accordance with the official price of gold. The elimination by Congress of an official gold price, effective as of 1 April 1978, completely confused the interpretation of this gold franc provision in Article 22. As discussed below in Point II, the federal courts that have faced the issue of how to deal now with Article 22 have resolved the matter in a variety of ways. Because of the critical role of the Warsaw Convention in American aviation law, and because of the crucial nature of Article 22 to the Convention, this Court should determine this important issue of federal law.

Petitioners contend that the limits of liability in Article 22 are unenforceable as of 1 April 1978. The court of appeals erred when it ruled that the limits are only prospectively unenforceable. Alternatively, if these limits are to be enforced, then the gold franc should be converted into dollars by using the only existing price of gold available, the free market price.

POINT II

The federal courts are in disarray over the interpretation of Article 22.

The Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), *amended by* Pub. L. No. 93-110, 87 Stat.

352 (1973), stated an official, legal relationship between gold and the dollar. As a result, converting the gold franc of Article 22 into dollars was not difficult; and the Civil Aeronautics Board published an order listing the limits for passengers and cargo based on the official price. Civil Aeronautics Board Order No. 74-1-16, 39 Red. Reg. 1526 (1974).

In its Act of October 19, 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976), the Congress eliminated the official price of gold, effective 1 April 1978. This legislation was to put into domestic effect the international commitment made by the United States as part of the so-called Jamaica Accords of 1975. Under these accords the decision was made to eliminate gold from its central position as the foundation of the international monetary system. See the Second Circuit's description of the relevant economic history at 690 F.2d at 307-8, A8-10.

The difficulty with the Congressional elimination of an official price of gold was that it destroyed the assumption upon which Article 22 had been founded. In both 1929 (when the Convention was drafted) and in 1934 (when the United States adhered to the Convention), there was a price of gold set by statute. Gold Reserve Act of 1934, 48 Stat. 337 (1934); Presidential Proclamation No. 2072 of January 31, 1934, 48 Stat. 1730 (1934); Act of March 14, 1900, ch. 41 §1, 31 Stat. 45 (1900). For the period between 1934 and 1978, therefore, the gold franc in Article 22 posed no problem because the limit was calculated on the basis of the value of gold set by law.

With the elimination of an official gold price, the question consequently arose as to the way by which to convert the Convention's gold franc into U.S. dollars. The federal district courts considering this question have reached a variety of results. The district court in the present case decided to use the last official price of gold. 525 F. Supp. at 1289; A20. Subsequently, in *Boehringer Mannheim Diagnostics, Inc.*, v. *Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981), *appeal*

docketed, No. 81-2519 (5th Cir. Feb. 2, 1982), Judge Ely of the Ninth Circuit, sitting by designation, held that to use the old official price would be to resort to a fiction. Consequently he converted the gold franc with reference to the free market price of gold. In *Kinney Shoe Corp.* v. *Alitalia Airlines*, 15 Av. Cas. 18,509 (S.D.N.Y. 1980) (not officially reported), the district judge made the conversion using the current French franc. Most recently in *In Re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, MDL-482 (C.D. Cal. Feb. 15, 1983) (reprinted at A29), the court ruled that the Article 22 limit is completely unforceable.

The only federal court of appeals to consider the present problem is the Second Circuit's decision in *Franklin Mint*, in which a still different conclusion was reached.

The Senate has had before it since 1977 a set of protocols, called the Montreal Protocols of 1975, that would amend Article 22 to state the limit of liability in terms of SDR's rather than in gold francs. It is questionable whether this provision will ever go into effect.[4] Although the Montreal Protocols were reported out of committee in 1981, the Senate has never voted on them. Likewise the United States has never ratified the two other protocols amending the Convention.[5]

Congress could also presumably resolve the matter by domestic legislation, as has been done in other countries. *See, e.g.*, Sweden's Aviation Act of 1957, Amendment to Article 22, Chapter 9, effective April 27, 1978; United Kingdom's Carriage by Air (Sterling Equivalents) (No. 2) Order 1980, Statutory In-

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[4]Before the Montreal Protocols go into effect internationally, thirty nations must ratify them. To date only about four have done so.

[5]The Hague Protocol of 1955 and the Guatemala City Protocol of 1971. In addition, the Guadalajara Convention of 1961, which supplements the Warsaw Convention, has never been ratified by the United States. All of these Protocols, including the Montreal Protocols of 1975, are reprinted in A. Lowenfeld, *Aviation Law, Documents Supplement* (2d ed. 1981).

struments 1980 No. 1873. There has been, however, no indication of any Congressional intent to do so.

Because of the complete disarray of the federal courts in resolving this fundamental issue concerning the Warsaw Convention, this Court should review the decision of the court of appeals so that the limitation of liability in Article 22 can be held unforceable from 1 April 1978.

CONCLUSION

Certiorari should be granted.

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